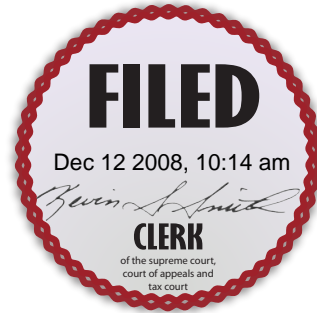


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JHIRMIL L. DAWSON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 41A05-0803-CR-174

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable Mark Loyd, Judge
Cause No. 41C01-0702-CM-00088

December 12, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Jhirmil L. Dawson (“Dawson”) was convicted in Johnson Circuit Court of Class A misdemeanor criminal trespass. He was sentenced to 180 days executed. Dawson appeals and argues three issues:

- I. Whether the evidence was sufficient to sustain Dawson’s conviction for Class A misdemeanor trespass;
- II. Whether there existed a fatal variance between the charging information and the evidence presented at trial; and
- III. Whether the trial court properly denied Dawson’s motion to dismiss.

We reverse.

Facts and Procedural History

June Stevens (“Stevens”) owns and rents a house. In January 2007, the tenant, Sam James (“James”), vacated the house. After James had vacated the house, Stevens visited it to begin cleanup. While there Stevens met Dawson who asked if she would lease the house. Stevens refused. When asked why Dawson was there, he replied that he was a friend of James. Stevens testified that she had a conversation with Dawson prior to February 2007 about not allowing Dawson on the property.

On February 9, 2007, Stevens found Dawson asleep on the floor of one of the house’s bedrooms. Stevens told Dawson to leave. She asked how he had entered the house. He responded that a maintenance man had let him in. She told him that she did not have a maintenance man and asked him to leave again. Dawson left immediately.

Stevens checked the back door and found that the door and wood frame had been tampered with. After a prior burglary at the house, Stevens had placed a wood board

across the frame. That board had been moved. Stevens then heard a car tire pop and went outside to find one of her tires flat. She called the police.

On February 23, 2007, the State charged Dawson with Class A misdemeanor criminal trespass. Following a bench trial held on March 3, 2008, the trial court found Dawson guilty as charged and sentenced him to 180 days executed. Dawson appeals.

Discussion and Decision

Dawson argues that the evidence was insufficient to sustain his conviction for trespass. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Dawson contends that the State did not prove that the house where Stevens found Dawson was Stevens's dwelling under the criminal trespass statute, Indiana code section 35-43-2-2(a)(5)(2004). The State charged Dawson under Indiana code section 35-43-2-2(a)(5) which provides that:

(a) A person who:

(5) not having a contractual interest in the property, knowingly or intentionally enters the dwelling of another person without the person's consent;

commits criminal trespass, a Class A misdemeanor.

Specifically, the State alleged that Dawson knowingly or intentionally entered the dwelling of Stevens without her consent. Appellant's App. at 14.

"Dwelling" is defined in Indiana code section 35-41-1-10 and means "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging." Lodging is defined in Webster's New Collegiate Dictionary 676, as (1) a place to live; (2) sleeping accommodations; (3) a temporary place to stay for the night; and (4) a room in the house of another used as a place of residence. See also Webster's Third New International Dictionary 1329 (1967).

The testimony of Stevens established that she was the landlord of the house where Dawson was found. It also established that at the time of the trespass, the former tenant was no longer occupying the premises and that a written lease did not exist with either Dawson or James. However, the State has not shown that Stevens was dwelling at the house at the time of the alleged trespass and Indiana code section 35-43-2-2(a)(5) requires that the person dwelling in the house also be the person who does not give consent to enter.

The State chose to charge Dawson under Indiana code section 35-43-2-2(a)(5) which requires that the accused enter the dwelling of another person, Stevens in this case, without that person's consent. If the State had chosen to charge Dawson under Indiana Code section 35-43-2-2(a)(1)(2004) then the evidence would have supported a conviction. Indiana code section 35-43-2-2(a)(1) provides that:

(a) A person who:

(1) not having a contractual interest in the property, knowingly or intentionally enters the real property of another person after having been denied entry by the other person or that person's agent;

commits criminal trespass, a Class A misdemeanor.

The evidence showed that Dawson did not have a contractual interest in the property, that he knowingly or intentionally entered the property of another person, Stevens, after being denied entry, and that he had been denied entry by the other person, Stevens. Tr. p. 29-30, 35, 45.

It is always tempting to consider a deficiency such as this one a mere “technicality.” But Hoosiers are proud to live in a state and nation that require their governments to conduct themselves according to, and to afford all citizens, due process of law. Each and every mere “technicality” is a small thread in the tapestry of Due Process, without which the tapestry begins to unravel.

Since the State failed to establish that the house in question was Stevens’s dwelling and not just under her care and control, then they have failed to prove one of the elements necessary to convict Dawson under Indiana Code section 35-43-2-2(a)(5). Therefore, the evidence was insufficient to support Dawson’s conviction for Class A criminal trespass.¹

Reversed.

BROWN, J., concurs.

BAKER, C.J., dissents with opinion.

¹Based on our decision, it is unnecessary to address the remainder of the issues raised in this appeal.

**IN THE
COURT OF APPEALS OF INDIANA**

JHIRMIL L. DAWSON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 41A05-0803-CR-00174
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

BAKER, Chief Judge, dissenting

I respectfully dissent from the majority’s determination that the evidence was not sufficient to support Dawson’s conviction for criminal trespass. As the majority observes, Indiana Code section 35-43-2-2(a)(5) required the State to prove that Dawson knowingly or intentionally entered the “dwelling of another person without the person’s consent.”

In my view, the State satisfied that burden. Indeed, the undisputed evidence at trial demonstrated that Stevens owned the house and her tenant had vacated the premises. Tr. p. 35. It was also established that Stevens was in possession and control of the house. Although Stevens told Dawson in mid-January that he was not welcome on her property, she found Dawson sleeping on the bedroom floor days later. Id. at 22-23.

As the majority observes, Indiana Code section 35-41-1-10 defines “dwelling” as a “building [or] structure . . . that is a person’s home or place of lodging.” When considering the statutory definition of a “dwelling” and the evidence presented at trial, I believe that the trial court could draw the reasonable inference that the house was a dwelling for purposes of the criminal trespass statute. To hold otherwise would necessarily mean that the owner of an empty rental house cannot hold a defendant accountable for criminal trespass under section (a)(5) for being on the property without consent merely because the owner does not currently reside there. Moreover, the State could conceivably be foreclosed from prosecuting an individual for trespass under section (a)(5) of the statute if the circumstances were such that the defendant unlawfully entered a residence in December but the premises were occupied only during the summer months. In my view, such a result does not comport with the spirit and intent of our criminal trespass statute. Indeed, when Stevens’s tenant vacated the premises, the possessory interest in the residence simply reverted to her. See Ind. Dep’t of State Revenue v. Indianapolis Transit Sys., Inc., 171 Ind. App. 299, 356 N.E.2d 1204, 1209-10 (1976) (observing that the purpose of a lease is to transfer for consideration certain rights in property, generally use and possession).

I also note that section (a)(5) of the trespass statute is directed toward the prosecution of an individual for the unauthorized entry into a dwelling, while section (a)(1) involves the prosecution of a defendant who enters the real property of another after having been denied entry onto the premises. In my view, section (a)(1) of the statute is directed toward prosecuting an individual for a trespass to land or upon a

structure that may never be considered a dwelling, such as a business or a structure where governmental employees work. That said, although the State certainly could have prosecuted Dawson under Indiana Code section 35-43-2-2(a)(1), I do not believe that it was required to do so. I would affirm Dawson's conviction.